ONTARIO COURTS AND PROCEDURE.[a]

II.

The Bar.

I cannot cover this part of the subject better than by quoting literally:[4]

"There are two classes of practitioners, barristers and solicitors. A lawyer must belong to one; most belong to both. The barrister alone can conduct a case at trial; the solicitor alone files pleadings.

"Those in the practice of the law in Upper Canada in 1797 formed a corporation, The Law Society of Upper Canada, which body was reincorporated in 1822 and still exists. In 1794 the Governor was empowered by the legislature to grant licenses to practice law as attorneys; this was owing to the great dearth in the Province at that time of persons acquainted with the law of England. The power was not abused, only a half dozen or so were thus appointed; and the Law Society has been responsible for practically all the practitioners of law since Upper Canada began her legal career, and in all for more than a century.

"Every five years all the barristers in the Province vote by ballot for thirty Benchers, who with certain ex-officio members form the governing body, or Bench. Collectively, the Benchers form Convocation; they fix the standard of education, conduct examinations and call to the Bar. It is necessary for the candidate for call to have been an admitted student of law for five years or for three years if he has a degree of B. A. or LL.B. in some recognized university. After being called by Convocation the young barrister is presented by a Bencher to the Court; he is then sworn, and thereafter he has the right of audience. The Court does not call to the Bar, and has nothing to do with the curriculum or examinations. Nor can the Court hear anyone not "called" by the Law Society of Upper Canada except a party in his own case. Non-professional agents are allowed in the Division Courts but not in the higher courts.

"Convocation has established and maintains the Law School at Osgoode Hall, at which every student must attend; it appoints the principal, the lecturers and examiners. Convocation also fixes the education of solicitors; and upon examining them grants a certifi-

[a] The first part of this paper appeared in the March number of the **Review**.

[4] The Courts of Ontario; by the Hon. William Renwick Riddell, Justice of the Supreme Court of Ontario; 62 Univ. of Penn. Law Review, 17 (Nov., 1913).

cate of fitness. The same requirements as to time of service as an articled clerk are imposed as in a case of a barrister. Upon the certificate of fitness being presented to a judge of the High Court, he grants a fiat for admission of the candidate as solicitor, and the oath is administered before the judge. Thereafter the new solicitor may practice in all the courts as solicitor.

"Every barrister and solicitor pays an annual fee to the Law Society and is subject to discipline of the society at all times. Any member may be removed or disbarred for cause.

"There does not seem to be any advantage in retaining the distinction between barrister and solicitor, but as it does no harm, and as we Canadians are an essentially practical people making no pretense of and caring nothing for logical consistency, we do not change simply for the sake of change. If any practical disadvantage were felt from the distinction it would not last six months.

"In the profession of barrister there is also a division into King's Counsel and members of the Outer Bar. King's Counsel are appointed by the administration for the time being of the Province. They have the privilege of wearing a silk gown and a peculiar form of coat and waistcoat. All other barristers are "Stuff-gownsmen" and wear a stuff gown. King's Counsel sit in the front row in appellate and weekly courts and have occasionally the right of preaudience. This is of small value and the distinction of being a King's Counsel is not much of an advantage. It is a relic of English practice and of no practical use but it does no harm and is therefore not abolished."

The principal point I wish to make is that the bar of Ontario is far nearer to the bar of the typical state than to the bar of England. The word "barrister" is not used nearly as commonly as "lawyer." The practice of retaining special counsel for trial is no more common in Ontario than in the States. The only difference is the insignificant one of ceremony, for the barrister who engages special trial counsel temporarily lays aside his gown and foregoes his right to address the court directly. But in the very next cause on trial he may resume his gown and with it full privileges.

A sermon could be hung on the coveted letters "K. C." It seems eminently practical that the really distinguished members of the bar should be openly recognized as such. The King's Counsel do not constitute an order. They belong to the Law Society of Upper Canada on precisely the same footing as other lawyers. They are not restricted in their field as in England.

There was reason why our forefathers should have swept away all traces of hereditary privileges but their zeal became fanaticism

when they deprived us of the opportunity for recognition of social and official worth. We have lost one of the strongest incentives for public service. And while we have imagined that we were stifling all privilege and all class distinctions, there has grown up among us that worst and most blatant of orders, the class that derives its sanction from wealth.

That the need for distinction is real is evidenced by our free adoption and corruption of such titles as "professor," "colonel," and "honorable."

The eminent authority whom I have quoted omitted reference to the existence of the Bar Association of Ontario. The Law Society is a corporate body and is all inclusive. To be sure a "solicitor" as such is not included, but the free functioning of barristers has prevented the development of a class of solicitors to correspond with the solicitors of England. Chief among these factors of freedom are the rights of the Ontario barristers to form partnerships and to accept annual retainers. (Throughout Canada the compounding of retainers for an annual salary and the acceptance of a single client, whether a private or municipal corporation, is looked upon with disfavor as a step toward commercializing the profession.[5])

The Law Society is eminently the working organization of the bar. But there is a need in the bar for the expresion of opinion individually on public matters and for social intercourse. In Ontario this is properly recognized as quite different from the need for legal education and professional discipline. So the Bar Association with its exclusive and voluntary membership came into being. The fact that the Bar Association is identical with bodies of like name on our side of the line supports my view that our associations are entirely unsuited, by their very nature, for establishing or enforcing standards of conduct, in short, for the discipline of the bar. It seems to point with equal force to the conclusion that both kinds of organization are needed.

While admission to the bar is almost universally through the portals which the Law Society guard, it is of course possible for Parliament to make a candidate a barrister by a special act. The Law Society evidently holds that it has no power whatsoever to modify its requirements. I have in mind a mimeograph letter issued in 1913 by an unsuccessful candidate appealing to members of the bench and bar for their influence in support of such a private bill. The letter recites the fact that its author failed to pass "the

[5] See address of Robert C. Smith, K. C. of Montreal, in 1913 Report of Pennsylvania Bar Association, p. 219.

matriculation examination in an Ontario university," but as he is over fifty years of age and the examination was on subjects entirely outside of the law, he felt justified in asking Parliament to pass a special act to permit the Law Society to admit him on passing the "final." The letter was issued in advance of a third attempt to prevail on Parliament, a campaign extending over six years. There was no wish to escape the "final" examination, or to be admitted if he could not pass it.

This sort of thing would doubtless appeal to many American lawyers as nothing short of tyrannous. To become a lawyer in Ontario one must actually attend school and the course of instruction and examinations are just as stringent as the bar may choose to make them. It is impossible to be admitted to practice as a matter of courtesy and then learn the law at the expense of clients.

The aspirant to legal honors must indeed make sacrifices in Ontario. No greater of course than are made by students for medical or engineering degrees in all countries, but there must be fair ability, genuine application, and the expenditure of a considerable sum for tuition. But when admission is won finally there is compensation. The candidate finds himself in a profession which is looked up to. He is free from the demoralizing competition which dulls the conscience of the young practitioner in the States. He is not impelled by starvation to cruise along the ragged coast of impropriety.

It is estimated that in the United States only fifteen per cent of the men admitted to the bar come from the law schools. We have also some schools which are notoriously insufficient and in all but a few the entrance requirements are too low. The universal reply to these reflections is that many good lawyers result from our lack of system; it should be met with the axiomatic statement that any man with pluck and brains enough to win his way at the bar would not be kept out by such requirements as those imposed in Ontario.

In a few states where examinations for admission have been made adequate the applicants almost necessarily are forced to attend a good law school. We are arriving in a few states at much the same condition attained in Ontario, but by an indirect and painfully slow process. As a final argument against innovation, conservative lawyers will likely assert that giving the power of admission into the custody of the bar itself makes it a monopoly, but it will be hard to get the public to shed any tears over a monopoly calculated to restrict the number of lawyers. The lack of restriction and dependence wholly upon the natural law of survival of the fittest, which has

prevailed in the United States and nowhere else in the world, injures alike the profession and the public. In fact their interests are identical. It is impossible to improve the profession without conferring benefit upon the public.

The people of Ontario have the power to upset the status at any time they wish through suitable legislation but there could be no proposal less popular in the Province than one looking to the lowering of the requirements for admission for the sake of adding more lawyers. In this they are doubtless like the people of all other countries who are not to be converted to the silly doctrine that they need more lawyers or that a multitude of indifferent lawyers is better than a fair quota of educated and self-respecting lawyers.

Procedure.

"We have got rid of form," said Mr. Justice MIDDLETON of the Supreme Court of Ontario as an introduction to the subject of procedure. It was Mr. Justice MIDDLETON, known as an expert on procedure before his appointment to the bench, to whom was intrusted recently the revision of the rules of court. He succeeded in condensing the rules to about one-half of the space they formerly occupied.[6]

"We have got rid of form. We have chased the old hindrance to common sense out of the Province. No longer can a person suffer in the courts of Ontario because of a matter of mere form. We are absolutely free now to administer justice according to the substantial rights of the parties, unrestricted as to formalities. Form is no more with us!"

"Except we can still invoke it if necessary to avoid an injustice," broke in Mr. Justice RIDDELL.

The principles underlying Ontario procedure are those which have operated successfully in England and Wales for forty years. Inasmuch as the same statement applies to all parts of the Empire there is reason for the belief that these principles are the bed-rock of judicial administration.

The essential difference between procedure in the States, whether under code or common law, and procedure in Ontario is here: in the States we provide for the litigants a cockpit in which they shall conduct their fight; the rules are liberal; they can bite, scratch, kick, and hit below the belt; the original controversy suffices to gain admission, and after that fresh grounds for controversy arise at every stage of the proceedings.

[6] The new rules took effect in September, 1913. See Canada Law Journal, June, 1913.

In Ontario the issuance of process means that a powerful piece of machinery has gripped the dispute and the parties and will not release them until it has adjudicated their rights. A responsibility is assumed by the entire judicial department of the Province when original process issues. There is such a solidarity to this branch of government that it can act with entire singleness of purpose and so discharge its clear responsibility thus definitely assumed.

The litigant who applies for relief must first assume a responsibility and this he does by filing his statement of claim. The defendant then must make an affirmative showing that a justiciable controversy exists or submit forthwith to judgment. A condition of mutual responsibility between the court and each litigant is thus established. All that is needed then is sufficient freedom on the part of the court and the natural self-respect which flows from the exercise of high authority to warrant efficient management of the situation.

In a general way this freedom and power comes from the right of the court to make its own rules, which implies the disposition to treat them as rules and not as substantive law. The rules themselves confer the utmost freedom for amendment and for bringing in other parties or other phases of the controversy than that first presented, in order that complete justice may be done in a single proceeding.

It will be seen at a glance how far from the common law theory of procedure England and Canada have gone. That narrowing of the issue by a mechanical process which still elicits the admiration of the common law practitioner in the States often precludes the doing of real justice.

One of the significant developments of the new principles lies in the settling of all incidental and procedural questions in advance of trial. Under the system which prevails with us the litigant is encouraged to take advantage of any departure from ideal form, to tuck a card up his sleeve as it were, and hold it there until the game has progressed so far that there can be no correction without beginning anew.

Not only is the subject matter enlarged at any stage in order to do substantial justice to all concerned, but the court, by virtue of the merger of law and equity, possesses all power with respect to the remedy to be chosen. Conflict is avoided by giving the equitable rule precedence.

In the narrow field of pleadings there is also a complete divorce from common law philosophy. The old rule that the pleadings must sustain the judgment needs only to be understood historically to be

upset by any modern rational scheme. It had its origin when the record was a small strip of parchment. Obviously the pleadings noted thereon must sustain the judgment as a necessary check against venality. But the modern record of testimony makes the old rule unnecessary. The true philosophy now must be that the judgment rests upon the entire record.

The theory which supplants the ancient rule with respect to pleadings is that they exist, not as a foundation for the judgment, but to give notice to the court and to the adversary. In Ontario the question with regard to pleadings is limited practically to the sufficiency of notice.

This brings pleadings to a businesslike basis. Usually proceedings are begun by writ of summons indorsed with a short statement of the cause of action; and this is the case whether the action be in contract or in tort, legal, or equitable, for goods supplied, or on mortgage of for slander.

In certain cases the cause of action is such as to permit of a "special indorsement," as a debt or liquidated demand in money arising out of a contract. Upon appearance entered, if indorsement is special, the plaintiff may file an affidavit verifying the cause of action and saying that in his belief there is no defense, and serve the defendant or his solicitor with a notice to motion for judgment. Then unless the court is satisfied that the defendant has a good defense on the merits, judgment will be given. This procedure is similar to special indorsement under the English rules, which effects a summary disposal of matters that do not admit of successful defense.

Under the new rules, when a writ is specially endorsed, the defendant must with his appearance file an affidavit that he has a good defense on the merits, showing the nature of his defense, and the facts and circumstances which he deems entitles him to defend. He must serve forthwith a copy of this affidavit on the plaintiff and the appearance is not received without the affidavit. The plaintiff may treat this as a statement of defense—or he may examine the defendant on it, and if it be disclosed that the facts do not constitute a defense, move for judgment. In some rare cases, even before appearance, the plaintiff may obtain leave to serve notice of motion for judgment and if he shows special circumstances may obtain immediate judgment.

The procedure throughout gives the impression that it is intended to assist creditors. Much of our contentious procedure is nothing but procedure on behalf of debtors. As long as the majority of citizens were debtors, and the few powerful and wealthy were

creditors, there was little complaint. But now conditions are reversed; the most persistent and elusive debtors are the powerful and wealthy corporations; the average citizen is solvent and is a creditor and investor. He finds the procedure of an earlier national epoch adapted to the defeat of justice by delays of various sorts. This may in part explain the general dissatisfaction with the ways of courts.

One of the features of our typical procedure is a presumption that the defendant in every action will in time present a substantial defense, which is nothing less than an invitation to debtors to engage counsel and go into court to "stave off judgment." The felicitous result of this looseness is that the court, which monopolizes the road to relief, becomes a virtual protector of the malefactor. The court becomes a fence to which the debtor flies for protection from the consequences of his own acts.

The pleadings, consisting essentially of the statement of claim and statement of defense, set forth the respective claims of the parties in ordinary language with a statement of the relief claimed. There is no opportunity for a metaphysical analysis of pleadings. If they are sufficient as notice they are good.

The expectation is that the parties will settle pleadings, preliminary motions and objections, and time of trial, before a master, so that when the cause is called in court there will be no incidental issues to cause a waste of time.

One of the very important matters thus effected before trial is the opportunity afforded for examination and discovery. After approval of the pleadings either party may obtain an order to produce. Then either party may be examined on oath before a master or examiner generally upon the whole cause. This examination for discovery is resorted to in nearly every contested cause and results in amicable settlement of a considerable proportion.

Causes lacking merit are weeded out and no time in open court is consumed. If the defense is flimsy, plaintiff gets judgment forthwith at a minimum of expense to both parties. It is inevitable that many suits would never have been brought if all the facts were disclosed. Mr. Justice RIDDELL says:

"I have found that the examination for discovery leads to the settlement of at least one-third and perhaps more of the cases that would otherwise be tried, and I have found it exceedingly valuable."

We have also many settlements before trial but a settlement effected through dread of expense or the uncertainty or delay of judicial proceeding, in the absence of precise knowledge of the opponent's strength, rankles in the breast. A settlement effected

with full knowledge of the adversary's ability to educe proof is an automatic adjudication calculated to establish the substantial rights of the parties.

But in our practice neither side can afford to play the game face up. Too often the principal thing is to catch the other fellow napping. Where the contentious system is permitted to run mad there can be no truce while the parties parley, for neither side can afford to take the first step.

Coming now to trial it should be noted that the sane use made of the jury in Ontario constitutes the most striking difference. The presumption is in favor of the individual juror's qualification. Jurors are never catechized and a challenge for cause is a very rare thing. Even in murder trials it takes but a few minutes to make up a jury.

The court has the right to refuse a jury in any civil cause except in actions for libel, slander, criminal conversation, seduction, malicious arrest, malicious prosecution and false improsonment, in which actions a jury will be employed unless the parties waive such trial. In causes arising from contract, juries are seldom called. The court of course reserves the right to call a jury at will and may do so even in a cause of an equitable nature if there be serious divergence as to fact and the cause may turn upon the credibility of witnesses.

The judge also has the right to discharge a jury at any stage if it be a cause *ex contractu,* or to disregard any verdict. Pettifogging tactics are squelched very easily.

Ten jurors may render a verdict. In most trials the jury is asked to give answers to questions of fact submitted to them in writing, and in such cases the jury have no right to give a general verdict. The judge enters the appropriate judgment upon the answers of the jury. If he considers that any answer has no evidence to support it, he disregards such answer; but he cannot order a new trial.

The number of causes tried by a jury is not large and it is steadily diminishing. Ontario has furnished for most trials a medium better in every way than the jury so that litigants voluntarily relinquish the outgrown method. In Quebec and in France, where there has long been opportunity for trial of civil actions by jury, the people prefer the judge because they distrust the common mind. Is it not a fair inference that our regard for jury trial evidences distrust of the judge, and that to wean our people from this species of trial by lottery, we must give them judges invested with such power that they can compete with jurors for the litigant's trust and confidence?

So in Ontario the jury has become what it was originally—an assistant to the judge. Seen in that light it is a sane and practical adjunct to the court and even for civil matters will probably never fall wholly into disuse.

The feature of Ontario trials which most surprises the visitor from the States is the informality in examining witnesses. It is quite common for witnesses to be held *incommunicado* and this makes it easy to unmask the liar. We should resort to this simple method far oftener than we do. A free use is made of leading questions until the nub of the story is reached and then the witness is encouraged to tell the affair in his own manner. A great deal of irritating and useless cross-examination is obviated by construing the testimony, in the absence of special grounds for suspicion, as the statement of a truthful and rational person. I will again quote Mr. Justice RIDDELL:[7]

"We do not have much bother about admission or rejection of evidence in our courts; unless we can see that the exclusion of evidence or the admission of evidence has led to some injustice, then we pass it by. Matters of law as a rule are the determining factors in the appellate court; although there are occasionally cases in which appeals succeed upon the ground of the non-admission of evidence or the admission of evidence which ought not to have been admitted. If a case is tried before a judge, and he has improperly admitted evidence—and I may say that is the rarest of all contingencies, because as a rule we admit the evidence subject to objection and then we never allow it to influence our minds, of course—if a judge has refused the evidence improperly, the Divisional Court does not as a rule send the case back for a new trial, but the court often says, 'We will sit on such a day; you can bring the evidence you desired the judge to hear and we will hear it here.' We hear the evidence and determine the case then and there, without sending it back with all the risk, expense, inconvenience, annoyance, and trouble of a new trial. If there is a row about the pleadings we say: 'Very well, we will amend the pleadings.' If a lawyer says: 'If that amendment had been made in the court below, we should have had other evidence,' we may say: 'Very well, what day will suit you? We shall hear your witnesses.'One of our substantial rules, and one of the rules more beneficial than perhaps fifty of the other rules is this, all amendments are to be made which are necessary in order that judgment shall be given according to the very right and justice of the case. No case in Ontario fails from the defect of form—that is one

[7] The Courts of Ontario; New York Bar Association Report for 1912, p. 806.

of our rules. Again, no disregard of forms laid down, or disregard of the time under which proceedings should be taken, no disregard of terminology, according to our practice, bars a man who has a right, of his right."

I saw a trial in the Toronto Assize which will illustrate the informal and flexible procedure and especially the opportunity for adding new parties in order to embrace the entire controversy. The plaintiff, Mary Smith, sued a certain broker. She had bought mining shares over a period of five years and on final accounting believed that she had been defrauded. Following the usual custom the broker had held the certificates in his vault and plaintiff had never had them in actual possession or even seen them. At the start it was explained that plaintiff's sister, Kate Smith, had also dabbled in stocks, had also employed the same broker, and had begun suit in her own behalf in the County Court of the same county. Counsel for defendant said that the controversy had arisen from a confusion of the two accounts, that his client had bought all the shares ordered by either or both of the customers, but could not say whether certain orders had been joint or individual, or whether he had delivered to each plaintiff the shares which each had intended to buy individually.

"I will move the case of Kate Smith from the County Court to this court," said his lordship. "During the lunch hour you will get the record of the case of Kate Smith and have it here at two o'clock. I will also join Kate Smith as a party to this action—with consent. Is it so understood?"

At two o'clock the court was prepared to ascertain the rights of all three. "It is understood now that Kate is a party to this action, and I have taken jurisdiction of the suit which she started in County Court. Proceed." With this foundation it was disclosed in less than an hour that a misunderstanding had arisen because one sister had at times acted for the other in buying shares. The broker had supposed these purchases to have been made jointly. The accounts had become so confused that it would have been impossible to ascertain the rights of the parties in two separate actions. The judgment was that Kate should transfer certain shares to Mary. No costs were allowed the broker, because, as the learned justice said, he should refuse to deal with women, or take the natural consequences.

With the lack of unification which is almost universal in the States it would be impossible to adjudicate a cause of this sort consisting virtually of two actions each in a different court.

A visitor will also be startled by directness of methods in the Appellate Divisions. I was once listening to argument on appeal.

In the afternoon, approaching time for the court to rise, it was found that the record did not disclose a certain fact which had become essential. Under our system nothing could have been done but remand case for retrial. The chief justice turned to one of the barristers and asked if he could ascertain the point in question.

"I can tell by asking my partner," he replied. The partner was at some distance in another city.

"Wire your partner at once," the chief justice directed, "and when the court sits tomorrow morning be prepared to give us the information." And on the following morning I attended court again, expecting to hear the opposing barrister emit a lusty roar. But instead two telegrams were handed to the judges, the decision was announced in acordance therewith, and there was not a single word of objection.

Ontario judges are inclined to attribute a great deal of their economy of energy to the rules governing amendment which read as follows:

> "The Court or a Judge may at any time amend any defect or error in any proceedings; and all such amendments may be made as are necessary for the advancement of justice, determining the real matter in dispute and best calculated to secure the giving of judgment according to the very right and justice of the case.
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> "The Court or a Judge may enlarge or abridge the time appointed by these rules or any rules relating to time or fixed by any order for doing any act or taking any proceeding, upon such terms as may seem just; and an enlargement may be ordered although the application is not made until after the expiration of the time appointed or allowed."

Commenting on this point, Mr. Justice RIDDELL said:[8]

"The other theory is that Courts are instituted to do justice between man and man, to see that every one gets his rights irrespective of the way in which his lawyer asks for them. Accordingly, the present practice which we try to follow—and our rules are laid down specifically in that view—is to get out what the facts are, and if the pleadings do not enable the parties to prove or rely upon these facts, amend the pleadings. If one party is inconvenienced or put to disadvantage, make him who has made the mistake pay the costs. Amend your pleadings, get out all the facts that bear on the issue and determine the matter according to the very right and merits of

[8] Practice, Civil and Criminal, in Ontario; The Hon. William Renwick Riddell; New York State Bar Association Report for 1912, p. 806.

the case. It is the client, after all, who has to pay the shot, and it is the client that should be considered, what harm if the record does get a jolt now and then."

There is reasonable expedition in the courts of Ontario. No such pressure exists as in the English courts, where every minute must see progress. Generally speaking there is no reason why the litigant in an important matter cannot have his cause tried within six months from issuing of the writ, and usually in much less time. And his appeal can be disposed of within two months of the trial, unless the vacation intervenes. But so close do the Appellate Divisions keep to the trial branches that when vacation begins there are only a few appeals left on the docket.

It is this absence of glutting in the reviewing branches and the few instances of remanding for retrial that make the progress of litigation keep pace with wishes of suitors. Under such circumstances the prolonging of causes to suit the convenience of counsel, which subjects our courts often to unfair censure, cannot occur, because the Ontario barrister cannot shift the blame from his shoulders. The people know that the courts stand ready to perform the public service for which they exist. If there is vexatious delay they know whom to blame.

As for economy of time in the court-room, a matter which is of far greater concern to the public because of expense than to the individual litigants, there is a wholesome status arising largely from the fact that the jury is only an adjunct of the court, not a fetish to which the judge is tied, as with us. And as to this matter much depends on the temperament of the judge. It is the custom of some judges to encourage the dismissal of witnesses brought to substantiate allegations which should be admitted, to shorten cross-examination, to pare the case down to its essential facts and to discuss the precedents informally with counsel, so that there is very little room left for oratory. This is similar to the practice in London, and while it may permit of getting through three or four trials in a day, there is no lack of courtesy to counsel and no impression that the trial lacks thoroughness.

On the other hand another Ontario judge may refrain from exerting pressure on counsel so that trial progresses in the easy and comfortable manner of a hearing in chancery on our side, though with fewer exceptions raised. They have the practice of usually retrying a cause after a disagreement at the same term. This not only works to the advantage of the sincere litigant but also prevents the shading of testimony and loss of witnesses which may result from postponement to a later term.

The personality of the judge is a factor in trials which appears to lead to confusion of thought among observers. While law and its administration is not a science, there is such a thing as judicial art. Some judges and some lawyers make an art of their exacting work. They accomplish a great deal more with the same expenditure of energy. Seeing this, reformers exhort the struggling judges of the common garden varieties to do likewise. Then, when the advice goes unheeded, there is a clamor for legislation intended to make all judges on a par with those specially endowed by nature.

The courts of Ontario are not charged with the keeping of statistics. On the other hand they are far from being in the disorganized condition with respect to data which marks our courts. The work is in the hands of a Provincial official known as the Inspector of Legal Offices. An annual report is made showing the number of actions of every sort in every part of the province with especial regard to the financial side. It would be better if these statistics were collected by the registrar of the Supreme Court under the direction of the Minister of Justice. Some person more directly connected with the department would doubtless add to the bare figures deductions which would be of extreme value, and make the annual report a readable document instead of a mere collection of tables. No criticism of the Inspector of Legal Offices is intended because it would be invidious for him to publish more than the bare facts.

In General.

The writer may be accused of being wildly enthusiastic about Ontario courts and procedure. But it isn't so. I do not think that Ontario courts are a bit better than they ought to be. There is still room for improvement, and it seems plausible that the young men reared in the spirit of the new rules will continue the work of adaptation and simplification which has been in progress already for nearly a generation.

They have in Ontario a plain, straightforward, working organization with no dark alleys and no ornamental frills. Its success lies in its poise. Progress has been made to the point indicated by present needs. So thoroughly representative is it of the conscious, critical, efficient democracy of the Province that it is bound to keep pace with all future demands. There can never be a serious quarrel between the people of Ontario and their courts, for they are one and the same thing. The courts are the people, functioning in a particular manner, and the people are the courts.

It is not necesary to go to Ontario to get a pretty definite idea of its judicial system, but it is worth while if only to get a per-

spective upon our own courts. In Ontario one hears the confused sounds from across the border as chaotic notes. It is not that the instruments are out of tune. The trouble is that there is no director. The great orchestra is trying to render several airs at once.

A student of our system cannot avoid profound sympathy for our judges who are held responsible, though without having power and unity to acquit themselves. And after gaining the perspective afforded by pursuing his investigation in Ontario the student will enlarge his sympathies to include the American lawyer. One comes to think of his work as the production at a prodigious expenditure of cerebration of a cobweb which is so nearly perfect as to pass for genuine—but only a cobweb.

And here it may be timely to consider the natural attitude of the American bar toward such a comparatively simple and direct procedure as has been related. The first and the overpowering impression will doubtless be that any trend in this direction necessarily implies sacrifice on the part of the lawyer. But there is room for a second thought.

In the first place the lawyer gets considerably less than half of his total remuneration from the trial of litigated matters. Only a small proportion of all causes ever reach trial. Not many lawyers are paid on a *per diem* basis. And back of all and most important is the eternal verity that no profession in the long run receives pay on any basis except that of *quantum meruit*.

Our system is admirably designed to make work for the lawyer. If the pay was in proportion to the time and nervous energy consumed, our bar would be the best paid in the world. But it is not. We have exceptional cases, but the American lawyer on the whole is a poorly paid agent. Is there any connection between the low financial rating of the average lawyer and the halting and uncertain service which our system permits him to render?

"The people of Canada are satisfied with their judges and their administration of the law, and yet they have absolutely nothing to do with their selection or appointment."[9] I quote from a recent very able comparison of Ontario and Pennsylvania courts.

Surely the scholarly author of the foregoing would not wish to abide by the latter proposition! The people of Canada have everything to do with the selection of their judges. The people of Canada themselves select all their judges and they do it through a system which guarantees genuine popular selection. Any intelligent

[9] Canadian and Pennsylvania Procedure; by David W. Amram; 62 Univ. of Penna. Law Rev., 269, 277 (Feb., 1914).

Canadian, whether judge or layman, would be moved to ironic laughter if told that the people of Canada do not select their judges. And he would be likely to say something snappy and entertaining about the way the people of most of the States select their judges.

In Canada judges are chosen explicitly by the leaders of the party which is voted into power by a majority of the people. It is only by some form of delegation, by some method of representation, that the people can rightly select judges or do anything else involving conscious and deliberate choice. As compared with the election of judges in the typical American city it is the difference between selection in the hands of irresponsible persons, made in the dark, and selection by highly responsible representatives working in the open. As compared with election in the rural districts, it is the difference between a number of worthy people, acting under many disadvantages, and a few who have a free hand to do the best they can.

On the theory that this is not real democracy, that Canadians do not select their judges, we should have to say that the people of the United States do not make their own laws or execute them; that they do not government themselves except in the rare instances when a franchise or some definite proposition like a bond issue is submitted on referendum. Even in the adoption of our deified constitutions it is notorious that a comparatively small percentage of the electorate have anything to say as to the matter to be submitted, or are qualified to speak.

But democracy cannot rest on mass action of the entire electorate. This natural, inevitable, mechanical limitation when considered with reference to the exercise of special judgment as in the selection of such experts as judges, is preposterous.

It is not merely expert selection that is afforded by the Ontario scheme of delegated powers, but quite as much the fact that selection is by a person directly charged with responsibility for the administration of justice. We need closer thinking on this point. Objectors who point to certain unpopular selections for the United State Federal Court judgeships should realize that the choice is made by one or two senators, and senators are not remotely responsible for the administration of justice. They have responsibilities in fact which are competitive with their natural desire to see the office filled by a man acceptable to the people.

If we had an elected minister of justice he would be the logical person to select United States judges, because he would represent the people, would be accountable to them, and would be directly responsible for the administration of justice. It is not a long step to

the creation of a minister of justice for a state, because unification of courts implies a single administrative head, who will, despite his title, be far more a minister of justice than a chief justice. It would be a logical development to impose upon the chief justice, subject to reasonable check, the appointment of all such judicial officers that cannot, from the very nature of the office, and the inherent limitations upon mass action, be better chosen at the polls.

Long service has made so many fair judges from ordinary material that there is argument in support of the view that life tenure is more important than expert selection. At the present time we are not in a proper frame of mind to discuss tenure dispassionately. Curiously enough the most powerful reform influence has concerned itself, in a perverted way, with the question of abruptly terminating judicial tenure. Probably in time we shall realize the absurdity of balancing the egg on the small end, and then we may see that there has been some truth and some error on the part of both friends and foes of the judicial recall. The idea of recall in some form as a continuing potentiality, appears, from the Ontario experience, to be the correct solution of the great problem of discipline, for which problem frequent and periodic election is instinctively felt to be a failure. The ever present contingency of recall may be also the natural concomitant of what we call life tenure. But in recalling a judge, quite as much as in selecting one, there is need for deliberate choice based upon adequate information, and for this function the electorate should delegate its power to an open, recognized, accountable agency.

This is the case in Ontario. The Supreme Court judge may be removed upon an address of both houses of Parliament. The people of all parties are represented in Parliament and a resolution can be introduced by any representative willing to stand sponsor for it. It is sincerely believed in Ontario that no undeserving judge could avoid resignation if his name were merely mentioned in a hostile spirit on the floor of the house.

In the case of County Court judges the recall can be initiated by any person or group of persons, and no formality is required. They simply need to inform the Governor General of their complaints. If these complaints are obviously unfair or partisan or hysterical they serve at least as an outlet for feeling. If there is remediable fault it is easy to bring pressure to bear where it will avail. If the complaints make a *prima facie* case which warrants removal, the Attorney General can not long prevent investigation, even presuming him to have a personal or partisan interest, which is almost impossible. But there is assurance of intelligent pro-

cedure so that the individual judge will not suffer unjustly, and so that the public service will not lose an officer in whom a big investment has already been made. This is the recall in a practical form, one shorn of potential folly, not a piece of political buncombe.

The judge appointed for good behavior necessarily ceases to be a politician or a political figure, and this alone would seem to justify the long tenure. Such a judge remains through successive administrations so that there can be no continuing pull with the party in power. No pull is exerted either way. The judge is free to perform the duty for which he is accountable. It is the consummation of political wisdom when the incumbent of office has his personal inclination made to coincide with his public duty. There is nothing further or better.

"The people of Canada are satisfied with their judges and their administration of law." This is certainly the fact, though a meticulous and unfair critic could raise an issue. This is due to two causes. Canadians are intensely partisan. Their political system is all shaped to fan partisanship. They have no vacation between campaigns. As soon as a party is placed in power the campaign to displace that party is begun. There is freedom of speech there fully as great as ours. In fact their newspapers take the brunt of the fight and some of them seem to exist for no other purpose.

The Canadian political system is admirably adapted to meet new conditions but it has this dark side of perpetual misrepresentation, and the "outs" do not hesitate to criticize the judges along with all other officers. The intention is to embarrass the government for alleged sins of omission or commission, as the case may be. Everything done under judicial process, civil or criminal, is in open daylight. Let a politician be arraigned in court in British Columbia or in Prince Edward Island and the next morning the papers published in every city in the Dominion are commenting on the magistrate in terms vitriolic or emmolient according to their alignment.

Another reason why one could gather critical reports is the rather ludicrous one that the shadow of inefficiency in judicial procedure has been projected from the United States across the boundary. An instance was cited of a Toronto editor who wrote a long screed upon the delay and expense of litigation and later admitted that he had gained his ideas wholly from reading New York exchanges. The need for resisting this insidious foreign influence, to avoid being inundated by a more numerous people, is one of the causes for the growing solidarity among Canadians.

There is no reason why pride or injured vanity should stand in the way of according to Ontario all the credit which is due for effi-

cient administration of justice. The facts are that Canadians have done no better than they should do, and we have fallen short, not because we are inferior, but because our burden has been greater. We have been carrying such a load of transcendentalism that we could not see the road or properly identify the simplest real objects along our route. We have always as now been incumbered by an artificial and academic scheme. Our state constitutions are modeled upon a constitution which was intended to be static. If the world had continued in the beaten paths of the ages our system would still suffice, for it is designed wholly to preserve what has been attained, and in order to do this readjustment and change must be restricted or prevented. Opportunity for local experiment, which is the great merit of our federated nation, has been choked by the copying of old constitutions in new states. But the parent constitution leaves within the scope of state government sufficient freedom for development, and now that we are waking up we have but to exercise that power and it is ours.

The first inroads of modern rationalism against feudalistic procedure appeared in the FIELD code and we have reason for pride in this achievement. But it came too early. The seed fell upon stony ground. In the absence of experience and foresight, false theories were embedded in code procedure. The whole world of thought is now dominated by ideas and principles which came into being after the code movement was launched. It has well been said that the administration of justice, like all phases of government, depends after all only upon applied knowledge of human nature. Our fund of knowledge as to what people can do and cannot do, has been so augmented since the times when DARWIN and SPENCER were publishing that an academic system projected before that day is assumed, almost necessarily, to be full of errors.

Of course the law is the last field to react to new philosophy, but it is yielding at last. The lawyers and judges may be as well versed as any men in modern philosophy, but after their conversion it takes a long time to change the forms. We must first live the new philosophy and there are strong evidences that we have been doing so. The newer ideals in penology are evidence of the fact. The commercial lawyers's regard for results is another.

We have a strange timidity regarding delegated powers and this is naturally most expressed in the public attitude toward the courts. More so with us doubtless because courts mean more to us than to our neighbors. This has been called the Puritan jealousy of power. It seems to me to be rather the distrust and hesitancy which comes from a long series of disillusionments. Our constitutions guarantee

in a way liberty, equality, happiness, SUCCESS, and we are brought up to believe in them without stint. We are like children who have dwelt too long in fairyland and are distrustful of everything, including themselves, when disillusionment comes.

Nothing could more strongly argue the need for readjustment than this almost universal distrust. Where it is strongest, it will be in vain to ask the people first to make an apparent sacrifice of powers, however much to their practical interest. Public confidence must be won in such states by first achieving efficiency through better court organization and rational procedure. In certain other states these changes are all that are needed to make a modern system.

We have in every state inherent political power to shape an efficient organization and develop businesslike and sensible procedure without conflict with the Federal constitution. We do not need inventors or clairvoyants, muckrakers, or hair-shirt prophets; experience elsewhere is sufficient, so we need only to select and adapt. It seems reasonably certain that no effort in line with the tremendous economic pressure of the times will be wasted and that ultimate success will be ours.

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